Why We Should Abolish Penalty Provisions for Compulsory Nonbinding Alternative Dispute Resolution

I. INTRODUCTION

Legislatures and courts have implemented alternative dispute resolution (ADR) in various forms across the United States because it reduces the pressures on overburdened court systems by promoting trial avoidance.[1] ADR can relieve court congestion, minimize delay, and lower court costs by providing alternative forums for dispute resolution, and by encouraging settlement.[2] In fact, the primary purpose of ADR, and its major attraction for legislative and judicial bodies, is docket reduction.[3]

Compulsory ADR and its attendant penalty provisions further docket reduction. Under compulsory ADR, judges can compel disputants to use ADR before resorting to trial. In many states, compulsory ADR is supplemented with penalty provisions. Such provisions authorize judges to financially punish disputants who reject ADR decisions and request trials *de novo*, but only when the trial outcome is not more favorable for those disputants than the ADR decision.[4] Using both compulsory ADR and penalty provisions, federal judges can coerce settlement, which is

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1. Dean Roscoe Pound's prophetic comments to the 1906 American Bar Association were credited with originating concern over a court system behind the times in its inability to address its growth with its existing structure. Ironically, Dean Pound discouraged expanding judicial systems by increasing review levels. Pound would not embrace compulsory nonbinding ADR followed by trials *de novo* after rejection of ADR decisions. Dean Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 35 F.R.D. 241, 284-89. *See also* Earl Warren, *The Problem of Delay: A Task for Bench and Bar Alike*, 44 A.B.A. J. 1043 (1958).

2. Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 488 (1989); Thomas D. Lambros & Thomas H. Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43, 43 (1980); A. Leo Levin & Deirdre Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. FLA. L. REV. 29, 31 (1985); Paul Nejelski & Andrew S. Zeldin, *Court-Annexed Arbitration in the Federal Courts: The Philadelphia Story*, 42 MD. L. REV. 787, 797 (1983); Simon H. Rifkind, *Are We Asking Too Much of Our Courts?*, 70 F.R.D. 79, 101 (1976); Justin A. Stanley, *Minor Dispute Resolution*, 68 A.B.A. J. 62 (1982); Steven Weller, John C. Ruhnka & John P. Martin, *The Rochester Answer to Court Backlogs*, 20 JUDGES 36, 36 (Summer, 1981); William E. Craco, Note, *Compelling Alternatives: The Authority of Federal Judges to Order Summary Jury Trial Participation*, 57 FORDHAM L. REV. 483, 483 n.2 (1988); Paul Mattingly, Note, *Compelled Participation in Summary Jury Trials: A Tale of Two Cases*, 77 KY. L. REV. 421, 421 (1988-89).

3. E.D. WASH. R. 39.1(a); CAL. CIV. PROC. CODE § 1141.10(a) (West 1982); ILL. ANN. STAT. ch. 110 ¶ 2-1001A (Smith-Hurd Supp. 1991); N.J. STAT. ANN. § 2A:23A (West 1987); OKLA. STAT. ANN. tit. 12, § 1801 (West Supp. 1991); N.C. CT. ORD. ARB. R. 1, comment. *See also* Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982); Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 465 (1984); Warren, *supra* note 1, at 1043.

4. *See infra* notes 20-28 and accompanying text.

forbidden judicial conduct under Rule 16 of the Federal Rules of Civil Procedure.[5] Further, compulsory ADR and its penalty provisions call into question the impartiality of overworked judges who have developed rules, or encouraged legislation which promotes mandatory ADR with penalties.

This Note identifies the three forms of compulsory nonbinding ADR and their creating statutes or rules. The identified statutes and rules are limited to general, rather than issue-specific forms of ADR.[6] Penalty provisions in the cited statutes are presented, and their constitutionality is briefly discussed. Finally, the propriety of such penalty provisions is questioned. The Note concludes with a recommendation to abandon penalty provisions and instead, to address overburdened dockets by sanctioning attorneys for pursuing frivolous litigation.

II. COMPULSORY NONBINDING ADR

Statutes and court rules designate ADR as compulsory and nonbinding. To date, statutes and rules have generated three forms of compulsory nonbinding ADR: arbitration, mediation, and summary jury trials.

Arbitration is by far the most prevalent compulsory nonbinding ADR form.[7] The arbitration process involves a hearing where an appointed or selected neutral party reviews evidence and renders a decision. Witnesses testify, and the parties present and challenge documentary evidence. Arbitrations are similar to bench trials with fewer

5. *See infra* notes 43-49 and accompanying text.

6. General ADR statutes and rules are not limited to a specific kind of dispute. Issue specific ADR statutes and rules are limited to a particular kind of dispute, such as child custody or employer-employee disputes.

7. N.D. CAL. R. 500-1; M.D. FLA. R. 8.02; N.D. IND. R. 32; S.D. IND. R. 33; W.D. MICH. R. 43; W.D. MO. R. 30; D. NEV. R. 185; M.D.N.C. R. 602; N.D. OHIO R. 17.02; S.D. OHIO R. 4.4; W.D. OKLA. R. 43; E.D. PA. R. 8; ARIZ. REV. STAT. ANN. § 12-133.A (Supp. 1990); CAL. CIV. PROC. CODE § 1141.11(c)(West Supp. 1991); COLO. REV. STAT. § 13-22-401 (1973); CONN. GEN. STAT. ANN. § 52-549n (West Supp. 1991); FLA. STAT. ANN. § 44.103(1) (West Supp. 1991); HAW. REV. STAT. § 601-20 (Supp. 1990); ILL. ANN. STAT. ch. 110, ¶ 2-1001A (Smith-Hurd Supp. 1991); MINN. STAT. ANN. § 484.74, subdiv. 1 (West 1990); N.J. STAT. ANN. § 2A:23A-20 (West Supp. 1991); OR. REV. STAT. § 33.360 (1988); PA. STAT. ANN. tit. 42, § 7361 (Purdon 1982); WASH. REV. CODE ANN. § 7.06.010 (Supp. 1991); ARIZ. UNIF. ARB. R. PROC. 1; CAL. JUD. ARB. R. 1600; DEL. SUPER. CT. C.P.R. 16(c); D.C. SUPER. CT. MAN. ARB. R. III; FLA. C.P.R. 1.700; ILL. SUP. CT. R. ch. 110A, ¶ 86; N.C. CT. ORD. ARB. R. 1-9; R.I. SUPER. CT. ARB. OF CIV. ACTIONS R. 1; WASH. SUPER. CT. MAND. ARB. R. 2.2(a).

formalities.[8]

Mediation is the second most prevalent form of compulsory nonbinding ADR.[9] As the least formal of the compulsory nonbinding ADR forms, mediation entails settlement negotiation through a neutral party. The mediator may not impose a settlement or express settlement preferences. The final agreement, as opposed to a judicial decision, is the disputants'. Witnesses and documentary evidence are usually not required.[10]

Mediation is startlingly absent in general ADR rules and statutes, which may confirm docket reduction as the apparent motive behind those general rules and statutes. Mediation appears more frequently in topic-specific ADR statutes and rules than in general ADR statutes and rules.[11] One may speculate that because mediation is concentrated in personal relationship-sensitive areas, it is selected by courts or legislatures for its unique personal relationship-preservation features,[12] rather than its

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8. Golann, *supra* note 2, at 498; Deborah R. Hensler, *What We Know and Don't Know About Court-Administered Arbitration*, 69 JUDICATURE 270, 271 (February - March, 1986); Levin & Golash, *supra* note 2, at 32; Nejelski & Zeldin, *supra* note 2, at 801-04; Weller, Ruhnka & Martin, *supra* note 2, at 38.

9. M.D. FLA. R. 9.03; N.D. IND. R. 32; S.D. IND. R. 33; E.D. MICH. R. 32; W.D. MICH. R. 42; D. NEV. R. 185; N.D. OHIO R. 17.02; S.D. OHIO R. 4.5; E.D. WASH. R. 39.1; COLO. REV. STAT. § 13-22-311 (1973); FLA. STAT. ANN. § 44.102 (West Supp. 1991); MICH. COMP. LAWS ANN. § 600.4951 (West 1987); OKLA. STAT. ANN. tit. 12, § 1801-06 (West Supp. 1991); FLA. C.P.R. 1.700.

10. WAYNE D. BRAZIL, EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES 17 - 20 (1988); JOHN W. KELTNER, MEDIATION: TOWARD A CIVILIZED SYSTEM OF DISPUTE RESOLUTION 23-25 (1987); NANCY H. ROGERS & CRAIG MCEWEN, MEDIATION: LAW POLICY PRACTICE 1, 7 (1989); Golann, *supra* note 2, at 497; Levin & Golash, *supra* note 2, at 36; Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J. 420, 422 (Spring 1982).

11. CAL. CIV. CODE § 4351.5 (West Supp. 1991) (annulment, separation, visitation rights); CAL. CIV. CODE § 4607 (West Supp. 1991) (divorce custody); CAL. EDUC. CODE § 48260.6 (West Supp. 1991) (truancy); CAL. WELF. & INST. CODE § 601.1 (West Supp. 1991) (truancy); COLO. REV. STAT. § 14-10-123.5(4) (1987) (child custody); COLO. REV. STAT. § 14-10-129.5(1)(c) (1987) (visitation rights); FLA. STAT. ANN. § 39.428 (West 1988) (family mediation); IOWA CODE ANN. § 598A (West Supp. 1991) (family disputes); LA. REV. STAT. ANN. § 9:351 (West Supp. 1991) (child custody and visitation); ME. REV. STAT. ANN. tit. 19, § 214 (Supp. 1990) (child support); ME. REV. STAT. ANN. tit. 19, § 581(4) (Supp. 1990) (marital separation); ME. REV. STAT. ANN. tit. 19, § 636 (Supp. 1990) (divorce); ME. REV. STAT. ANN. tit. 19, § 665 (Supp. 1990) (annulment); ME. REV. STAT. ANN. tit. 19, § 752 (Supp. 1990) (child custody); MICH. COMP. LAWS ANN. § 552.513 (West 1988) (domestic relations); MONT. CODE ANN. § 20-7-462(4) (1989) (surrogate parent for handicapped children); N.H. REV. STAT. ANN. § 458:15-a (Supp. 1990) (marital affairs); N.M. STAT. ANN. § 40-12-5 (Supp. 1989) (domestic relations); N.C. GEN. STAT. § 50-13.1 (Supp. 1990)(child custody); N.D. CENT. CODE § 14-09.1 (Supp. 1989) (child custody); OR. REV. STAT. § 107.755 (1990) (divorce, annulment, separation, child custody); WASH. REV. CODE ANN. § 26.09.015 (Supp. 1991) (divorce); WIS. STAT. ANN. § 767.11(5) (West Supp. 1990) (child custody, divorce, family relations); MD. CT. R. S73A (child custody and visitation); MICH. CT. R. 3.211 (domestic relations).

12. *Id.*; ROGERS & MCEWEN, *supra* note 10, at 35 (mediation gives participants more control over resolution of their disputes; the non-adversarial format promotes maintaining relationships).

docket reduction features. Consequently, the absence of mediation in general ADR rules and statutes, may indicate that the general rules and statutes are not intended to address disputants' needs and relationships, but are designed to address docket reduction.

Summary jury trials (SJT) are the least employed form of compulsory nonbinding ADR.[13] This little recognized ADR form is a relative newcomer to the ADR scene. Judge Thomas Lambros, District Court Judge for the Northern District of Ohio, created the SJT in 1980.[14] The SJT gives parties an opportunity to try their cases in an abbreviated form before a jury. The parties present descriptions of expected testimony and excerpts of expected evidence. In theory, the jury in a SJT should decide the case without knowledge that it is rendering an advisory decision. The SJT facilitates recognition of case merits, sometimes making settlement more attractive.[15]

Statutes and court rules can make all three forms of ADR compulsory and nonbinding in the same manner. The statutes and rules make ADR compulsory either by permitting courts to order ADR,[16] or by designation.[17] Similarly, the statutes and rules render ADR nonbinding by express language,[18] or by providing for the right to a trial *de novo* upon rejection of the ADR decision.[19] However, the label "nonbinding" may be

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13. C.D. ILL. R. 17(E); N.D. IND. R. 32; S.D. IND. R. 33; W.D. MICH. R. 44; D. NEV. R. 185; N.D. OHIO R. 17.02; S.D. OHIO R. 4.5; M.D. PA. R. 513.

14. Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 463. (Jan. 1984).

15. Golann, *supra* note 2, at 499, 500; Lambros, *supra* note 14, at 470; Lambros & Shunk, *supra* note 2, at 46.

16. M.D. FLA. R. 9.03; C.D. ILL. R. 17(E); N.D. IND. R. 32; S.D. IND. R. 33; E.D. MICH. R. 32(a); W.D. MICH. R. 42(a); D. NEV. R. 185; N.D. OHIO R. 17.02; S.D. OHIO R. 4.5; E.D. WASH. R. 39.1(c); ARIZ. REV. STAT. ANN. § 12.133A (Supp. 1990); CAL. CIV. PROC. CODE § 1141.11(c) (West Supp. 1991); CONN. GEN. STAT. ANN. § 52-549n-aa (West Supp. 1991); FLA. STAT. ANN. § 44.102(1), 103(1) (West Supp. 1991); HAW. REV. STAT. § 601-20 (Supp. 1990); MINN. STAT. ANN. § 484.74 (West 1990); 42 PA. CONS. STAT. ANN. § 7361(a) (Purdon 1982); ARIZ. ARB. PROC. R. 1(b); CAL. R. 1600; DEL. SUPER. CT. R. 16(c); FLA. C.P.R. 1.700(a), 1.730; N.C. CT. ORD. ARB. R. 1; R.I. SUPER. CT. CIV. ACTION ARB. R. 1; WASH. SUPER. CT. MAND. ARB. R. 2.2(a).

17. N.D. CAL. R. 500-1; M.D. FLA. R. 8.02; D.C.N.J. R. 47C; W.D.MICH. R. 43(e)(1); W.D. MO. R. 30.C; M.D.N.C. R. 602(a); S.D. OHIO R. 4.4; W.D. OKLA. R. 43(B)(2); E.D. PA. R. 8.3; COLO. REV. STAT. § 13-22-401 (1973); ILL. ANN. STAT. ch. 110, ¶ 2-1001A (Smith-Hurd Supp. 1991); N.J. STAT. ANN. § 2A:23A-20 (West Supp. 1991); OR. REV. STAT. § 33.360 (1988); D.C. SUPER. CT. MAND. ARB. R. III; ILL. SUP. CT. R. ch. 110A, ¶ 86(a).

18. S.D. OHIO R. 4.4; W.D. OKLA. R. 43(B)(2); MINN. STAT. ANN. § 484.74 (West 1990).

19. N.D. CAL. R. 500-7(a); M.D. FLA. R. 8.06(a); E.D. MICH. R. 32(j); W.D. MICH. R. 43(j)(3); W.D. MO. R. 30.I; D.C.N.J. R. 47G; M.D.N.C. R. 608; W.D. OKLA. R. 43(P)(1); ARIZ. REV. STAT. ANN. § 12-133H (Supp. 1990); CAL. CIV. PROC. CODE § 1141.20 (West Supp. 1991); COLO. REV. STAT. § 13-22-405 (1973); CONN. GEN. STAT. ANN. § 52-549Z (West Supp. 1991); FLA. STAT. ANN. § 44.103(5) (West Supp. 1991); ILL. ANN. STAT. ch. 110, ¶ 2-1004A (Smith-Hurd Supp. 1991); N.J. STAT. ANN. § 2A: 23A-26 (West Supp. 1991); OR. REV. STAT. § 33.400(2)(a) (1988); 42 PA. CONS. STAT. ANN. § 7361(d) (Purdon 1982); WASH.

a misnomer when penalty provisions are included.

III. PENALTY PROVISIONS AND THEIR CONSTITUTIONALITY

ADR rules and statutes permit requests for trials *de novo* when parties are dissatisfied with ADR decisions. The purpose of this right to a trial *de novo* is to prevent unconstitutional denial of trial rights. However, compulsory ADR penalty provisions may, in effect, render trials *de novo* illusory constitutional protections.

A. Penalty Provisions

ADR participants may freely request trials *de novo,* however, strings are attached. If the requesting disputant does not improve on the compulsory ADR decision at trial, most states and courts require that the disputant be punished.

Courts and state legislatures have devised a variety of penalty arrangements. All penalties are contingent on the trial *de novo* petitioner receiving a trial judgment which is not better than the ADR decision. Some states and courts require deposit of a forfeitable arbitrator's fee[20] or a flat penalty fee[21] with the trial petition. The requesting disputant forfeits the deposited funds if that disputant fares no better at trial than in the ADR decision. Other courts and states require payment of trial court costs;[22] costs and the opponent's attorney's fees;[23] or costs, attorney's fees, the opponent's investigation costs and expert witness expenses and fees.[24] Combinations of flat penalty fees and trial costs[25] or arbitrator

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REV. CODE ANN. § 7.06.050 (Supp. 1991); ARIZ. ARB. R. 7(a); CAL. CT. R. 1616(a); DEL. SUPER. CT. R. 16(c)(8)(A); D.C. SUPER. CT. MAND. ARB. R. XIII; FLA. C.P.R. 1.820(h); ILL. SUP. CT. R. ch. 110A, ¶ 93(a); N.C. CT. ORD. ARB. R. 5; R.I. SUPER. CT. CIV. ACTION ARB. R. 5; WASH. SUPER. CT. MAND. ARB. R. 7.1(a).

20. W.D. Mo.R. 30.J.2; M.D.N.C. R. 608(a), (e); W.D. OKLA. R. 43(P)(3)(4); N.J. STAT. ANN. § 2A:23A-27 (West Supp. 1991); N.C. CT. ORD. ARB. R. 5(b).

21. M.D. FLA. R. 8.06; D.N.J. R. 47(G)(3); E.D. PA. R. 8.7.E; ILL. SUP. CT. R. ch. 110A, ¶ 93(a); R.I. SUPER. CT. CIV. ACTION ARB. R. 5(b).

22. E.D. MICH. R. 32(j)(3), (4); W.D. MICH. R. 42(j)(3), (4); MICH. COMP. LAWS ANN. § 600.4969 (West 1987); WASH. SUPER. CT. MAND. ARB. R. 7.3.

23. S.D. OHIO R. 4.4, Appendix Order 85-1, 11.3; COLO. REV. STAT. § 13-22-405(3) (1973); 42 PA. CONS. STAT. ANN. § 7361(d) (Purdon 1982); WASH. REV. CODE ANN. § 7.06.060 (Supp. 1991).

24. N.J. STAT. ANN. § 2A:23A-29 (West Supp. 1991).

25. OR. REV. STAT. ANN. § 33.400(2)(c), (d) (1988).

compensation and trial costs[26] are assessed in some states and courts. Only one state requires payment of arbitrator compensation, fees, and costs of the arbitration.[27] Finally, the District of Columbia is the only jurisdiction requiring payment of arbitrator compensation, trial and arbitration costs, expert trial witness and arbitration witness costs, and interest on the arbitration award.[28] Of the twenty-seven different general compulsory nonbinding ADR penalty provisions, fourteen permit waiver based on economic hardship.[29]

B. *Constitutionality*

Compulsory nonbinding ADR rules and statutes permit trials *de novo* in order to prevent violations of the United States Constitution and of state constitutions. Except for deprivations of fundamental rights or where no due process exists, the United States Constitution does not grant a general federal right to trial for civil disputes.[30] The Seventh Amendment to the United States Constitution does grant a federal court right to jury trial for controversies exceeding twenty dollars and for which there existed a cause of action in 1791, when the Seventh Amendment was passed.[31] Federal trial rights are also statutorily granted.[32] General rights to state court trials are found in state constitutions,[33] rather than in

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26. W.D. MICH. R. 43(j)(3); ARIZ. REV. STAT. ANN. § 12-133(g), (i) (Supp. 1990); CAL. CIV. PROC. CODE § 1141.21 (West Supp. 1991); FLA. STAT. ANN. § 44.103(5) (West Supp. 1991); ARIZ. ARB. R. 7(f).

27. DEL. SUPER. CT. R. 16(c)(8)(D).

28. D.C. SUPER. CT. MAND. ARB. R. XIII(c).

29. M.D. FLA. R. 8.06(a); D.N.J. R. 47(G)(3); W.D. MICH. R. 43(j)(4); M.D.N.C. R. 608(a); W.D. OKLA. R. 43(P)(3); E.D. PA. R. 8.7E; ARIZ. REV. STAT. ANN. § 12-133-I (Supp. 1990); CAL. CIV. PROC. CODE § 1141.21 (West Supp. 1991); COLO. REV. STAT. § 13-22-311(4) (1973); FLA. STAT. ANN. § 44.103(5) (West Supp. 1991); N.J. STAT. ANN. § 2A:23A-29 (West Supp. 1991); ARIZ. ARB. R. 7(b); D.C. SUPER. CT. MAND. ARB. R. XIII(c); ILL. SUP. CT. R. ch. 110A, para. 93(c).

30. U.S. v. Kras, 409 U.S. 434, 444 (1973); Boddie v. Connecticut, 401 U.S. 371, 378-79 (1971).

31. Tull v. U.S., 481 U.S. 412 (1987); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 333 (1979).

32. *E.g.*, 42 U.S.C. § 2000b-2 (1989) (discrimination in public accommodations); 42 U.S.C. § 2000c-8 (1989) (discrimination in public education).

33. States either provide for jury trial or court access or both in their constitutions. *E.g.*, ALA. CONST. art. I, § 11 (jury trial); ARIZ. CONST. art. II, § 23 (jury trial); ARK. CONST. art. II, § 7 (jury trial); CAL. CONST. art. I, § 16 (jury trial); CONN. CONST. art. I, § 19 (jury trial); DEL. CONST. art. I, § 4 (jury trial); FLA. CONST. art. I, § 22 (jury trial); GA. CONST. art. I, § 1, para. 11 (jury trial); GA. CONST. art. I, § 1, para. 12 (court access); HAW. CONST. art. I, § 13 (jury trial); IDAHO CONST. art. I, § 7 (jury trial); ILL. CONST. art. I, § 12 (court access); ILL. CONST. art. I, § 13 (jury trial); IND. CONST. art. I, § 12 (court access); IND. CONST. art. I, § 20 (jury trial); IOWA CONST. art. I, § 9 (jury trial); KAN. CONST. Bill of Rts. § 5 (jury trial); KY. CONST. § 7 (jury trial); KY. CONST. § 14 (court access); LA. CONST. art. I, § 22 (court access); MD. CONST. Dec. of Rts. art. XXIII (jury trial); MASS. CONST. pt. 1, art. XV, § 16 (jury trial); MICH. CONST. art. I, § 14 (jury trial); MINN. CONST. art. I, § 4 (jury trial); MISS.

the United States Constitution. Courts have not applied Seventh Amendment trial rights through the Fourteenth Amendment to the United States Constitution.[34]

The United States Constitution indirectly protects trial rights granted by federal and state laws. When constitutions or statutes establish a federal or state right to trial, a property interest in the trial right exists.[35] This property interest cannot be denied without due process of law, as required by the Fourteenth Amendment to the United States Constitution.[36] This Fourteenth Amendment protection is waivable, like any other constitutional right.[37] However, participation in compulsory ADR is not a waiver of trial rights in exchange for ADR proceedings, because participation is involuntary.

Trials *de novo* are included in compulsory ADR rules and statutes to forestall constitutionally-based trial denial challenges, but the penalty sections render trial *de novo* provisions insufficient constitutional Band-Aids. While the fines may be waived in some states and courts, there is no guarantee that they will be waived. Further, the looming presence of penalties may discourage trial requests regardless of waiver provisions.

The United States Supreme Court has held that laws and court rules which serve to chill one's exercise of constitutional rights through application of penalties is an unconstitutional due process violation.[38] Judge Richard Posner, of the United States Seventh Circuit Court of

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CONST. art. III, § 24 (court access); MO. CONST. art. I, § 14 (court access); MONT. CONST. art. II, § 16 (court access); MONT. CONST. art. II, § 26 (jury trial); NEB. CONST. art. I, § 6 (jury trial); NEV. CONST. art. I, § 3 (jury trial); N.H. CONST. pt. 1, art. XX (jury trial); N.J. CONST. art. I, para. 9 (jury trial); N.M. CONST. art. II, § 12 (jury trial); N.Y. CONST. art. I, § 2 (jury trial); N.C. CONST. art. I, § 18 (court access); N.C. CONST. art. I, § 25 (jury trial); N.D. CONST. art. I, § 9 (court access); N.D. CONST. art. I, § 13 (jury trial); OHIO CONST. art. I, § 5 (jury trial); OHIO CONST. art. I, § 16 (court access); OKLA. CONST. art. II, § 6 (court access); OKLA. CONST. art. II, § 19 (jury trial); PA. CONST. art. I, § 6 (jury trial); PA. CONST. art. I, § 11 (court access); R.I. CONST. art. I, § 15 (jury trial); S.C. CONST. art. I, § 9 (court access); S.D. CONST. art. VI, § 6 (jury trial); S.D. CONST. art. VI, § 20 (court access); TENN. CONST. art. I, § 6 (jury trial); TENN. CONST. art. I, § 17 (court access); TEX. CONST. art. I, § 15 (jury trial); UTAH CONST. art. I, § 11 (court access); VT. CONST. ch. I, art. 4 (court access); VT. CONST. ch. I, art. 12 (jury trial); VA. CONST. art. 1, § 11 (jury trial); WASH. CONST. art. I, § 21 (jury trial); W. VA. CONST. art. III, § 13 (jury trial); WIS. CONST. art. I, § 5 (jury trial); WYO. CONST. art. I, § 8 (court access).

34. Alexander v. Virginia, 413 U.S. 836 (1973); Mountain Timber Co. v. Washington, 243 U.S. 219, 235 (1916).

35. Logan v. Zimmerman Brush Co., 455 U.S. 422, 429-34 (1982).

36. *Id.* at 432. *See also* Leis v. Flynt, 439 U.S. 438 (1979); Mathews v. Eldridge, 424 U.S. 319, 332-33 (1976); Arnett v. Kennedy, 416 U.S. 134, 166 (1974).

37. Brewer v. Williams, 430 U.S. 387, 402-06 (1977); Davis v. U.S., 411 U.S. 233, 243-45 (1973); Brookhart v. Janis, 384 U.S. 1 (1966).

38. Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978); Shapiro v. Thompson, 394 U.S. 618, 631 (1969); U.S. v. Jackson, 390 U.S. 570, 581 (1968); Harman v. Forssenius, 380 U.S. 528, 540 (1965).

Appeals, was justifiably skeptical about penalty provisions. He noted that they create legality problems because they are "potent disincentives to insisting on a trial."[39] Compulsory nonbinding ADR penalties chill the exercise of trial rights by punishing people for asserting those rights.

Penalties are devices used to deter future action.[40] As financial disincentives, ADR penalties are devices used to deter disputants from resorting to trial. Although this deterrence function does further the underlying general ADR docket reduction goal,[41] its success in actually deterring exercise of trial rights is unknown. Reports indicate that a minimal number of cases using ADR reach trial. The studies do not conclusively indicate whether that result stems from deference or from satisfaction with ADR.[42]

IV. PENALTY PROVISIONS AND RULE 16 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 16 of the Federal Rules of Civil Procedure authorizes courts to encourage pretrial settlement. However, that authority is limited. Courts do not have the authority to force settlement on the parties. Compulsory ADR penalty provisions provide federal courts with the means to circumvent the limitations on Rule 16 settlement authority.

Rule 16 governs federal judges' pretrial case management. Federal judges have broad authority to call conferences between the parties in order to clarify the nuances of the dispute, set the pretrial schedule, and encourage settlement. Specifically, the Rule states that courts may call pretrial conferences in order to "facilitat[e] the settlement of the case."[43] Further, the Rule authorizes judges to discuss "the

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39. Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 391 (1986).

40. U.S. v. ITT Continental Baking Co., 420 U.S. 223, 232 (1975). See also BLACK'S LAW DICTIONARY 1133 (6th Ed. 1990).

41. Christopher Simoni, *Court-Annexed Arbitration In Oregon: One Step Forward and Two Steps Back*, 22 WILLAMETTE L. REV. 237, 248 (Summer 1986); James C. Thornton, Note, *Court-Annexed Arbitration: Kentucky's Viable Alternative to Litigation*, 77 KY. L.J. 881, 895, 907(1988-89).

42. DAVID L. BRYANT, JUDICIAL ARBITRATION IN CALIFORNIA: AN UPDATE 23 (1989) (2.9% went to trial); STEVENS H. CLARKE, ET AL. COURT-ORDERED ARBITRATION IN NORTH CAROLINA: AN EVALUATION OF ITS EFFECTS 32 (1989) (8.7% went to trial).

43. (a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as (1) expediting the disposition of the action; (2)

possibility of settlement or the use of extrajudicial procedures to resolve the dispute."[44] To encourage settlement under Rule 16, judges have used ADR forms as "extra judicial procedures."[45]

Judges can impose sanctions under Rule 16 when parties fail to participate in good faith in pretrial management.[46] However, judges may not use sanctions to coerce involuntary compromise or settlement. In *Kothe v. Smith*,[47] the Second Circuit Court of Appeals vacated a judgment against the defendant, requiring payment of a $1000 penalty to the plaintiff, a $1000 penalty to the expert witness, and $480 in court fees.[48] The trial court punished the defendant because the case was not settled before trial. The appeals court held that the penalties were impermissible pressure tactics.[49] The court noted that Rule 16(e) was intended to encourage pretrial settlement, not to impose settlement on unwilling parties.[50] Other federal courts and state courts have followed the *Kothe v.*

> establishing early and continuing control so that the case will not be protracted because of lack of management; (3) discouraging wasteful pretrial activities; (4) improving the quality of the trial through more thorough preparation, and; (5) facilitating the settlement of the case.
>
> . . . .
>
> (c) Subjects to Be Discussed at Pretrial Conferences. The participants at any conference under this rule may consider and take action with respect to . . . . (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute . . . .

FED. R. CIV. P. 16.

44. *Id.*

45. Federal Reserve Bank v. Carey-Canada, Inc., 123 F.R.D. 603, 607 (D. Minn. 1988); McKay v. Ashland Oil, Inc. 120 F.R.D. 43 (E.D. Ky. 1988); Arabian Amer. Oil Co. v. Scarfone, 119 F.R.D. 448 (M.D. Fla. 1988).

46.
> Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon, motion or the judge's own initiative, may make such orders with regard thereto as are just . . . .

FED. R. CIV. P. 16(f).

47. 771 F.2d 667, 669 (2d Cir. 1985).

48. *Id.* at 669.

49. *Id.*

50. *Id.*

Smith rationale.[51]

ADR penalty provisions coerce settlement, and directly violate restrictions on Rule 16 judicial authority. As a Rule 16 pretrial settlement procedure, ADR methods must follow the same requirements as any other pretrial settlement technique. Judges mandating ADR may not impose impermissible pressure tactics through penalties. The apparent purpose of ADR penalties is to pressure the parties to be satisfied with the ADR decision. When courts mandate ADR and penalize parties who are dissatisfied with ADR decisions, the ADR decisions stand in the same position as pretrial settlement offers and the penalties coerce parties to accept the ADR decision. In short, judges are accomplishing settlement coercion by calling it "ADR." Indeed, no sanctioning authority exists allowing judges to apply ADR penalties when ADR is used under Rule 16(c)(7).

The use of ADR as a settlement device under Rule 16 appears to operate like Rule 68 of the Federal Rules of Civil Procedure and its penalty provisions.[52] Under Rule 68, judges can require a party, who rejected a pretrial settlement offer, to pay the costs incurred by both parties from the date of the offer. Courts apply these sanctions only when the offeree's trial judgment is less than the offer. Rule 68 sanctions are distinguishable from compulsory nonbinding ADR penalties.

Because compulsory ADR is compelled by the court it is distinguishable from Rule 68. The compulsory ADR parties are forced by the judge into the ADR proceeding. They have no choice but to comply and are penalized when they reject the ADR decision and fare no better at trial. Under Rule 68, settlement offers are extended on a purely voluntary basis. Even when parties accept Rule 68 offers during Rule 16 pretrial management, a voluntary offer is a prerequisite to triggering Rule 68 because Rule 16 prohibits coerced offers. Under the combination of

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51. In re Ashcroft, 888 F.2d 546, 547 (8th Cir. 1989); G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 653 (7th Cir. 1989); Strandell v. Jackson County, Ill., 838 F.2d 884, 887 (7th Cir. 1987); Federal Reserve Bank v. Carey-Canada, Inc., 123 F.R.D. 603, 606, 607 (1988); Lockhart v. Patel, 115 F.R.D. 44, 47 (E.D. Ky. 1987); People ex. rel. Horwitz v. Canel, 215 N.E.2d 255 (1966); Mitchell v. Iowa Cab Co., 31 A.D.2d 519 (1968).

52. At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

Fed. R. Civ. P. 68.

Rules 16 and 68, the choice to make no settlement offer means parties may freely proceed to trial without punishment concerns. In effect, the offer under Rule 68 occupies the same position as the ADR decision under compulsory nonbinding ADR. However, Rule 68 sanctions either apply to voluntary settlement offers after parties have dickered over offer terms or are not triggered because no offers were made. Compulsory ADR penalties apply solely to involuntary pretrial settlement.

Judge Charles E. Clark, member of the United States Supreme Court's Advisory Committee on Rules of Civil Procedure from 1935 through 1956, cautioned judges against compelling settlement.[53] Addressing pretrial management techniques, Judge Clark stated that compelling settlement could be deemed "dangerous as bringing in question the impartiality of the tribunal whose duty it is to sit in judgment."[54]

V. THE APPEARANCE OF JUSTICE

A system of justice demands judicial impartiality. For the United States, justice system to retain credibility and some semblance of order, its judges must at least appear just. The United States Supreme Court has held that justice in the court system must "satisfy the appearance of justice."[55] Courts have applied this requirement to reverse judicial decisions or to disqualify judges.[56]

United States Supreme Court Justice Thurgood Marshall noted that the problem "is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges."[57] Judges must promote confidence in the judiciary by avoiding the mere appearance of impropriety. Federal and state statutes exist to further that end.[58]

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53. Charles E. Clark, *To An Understanding Use of Pre-Trial*, 29 F.R.D. 454, 456 (1961). Judge Clark was a United States Court of Appeals judge for the Second Circuit.

54. *Id.*

55. Liljeberg v. Health Acquisition Services Corp., 486 U.S. 847, 864 (1988) (quoting In re Murchison, 349 U.S. 133, 136 (1955)); Aetna Life Ins. Co. v. LaVoie, 475 U.S. 813, 825 (1986) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)); Offutt v. U.S., 348 U.S. 11 14 (1954).

56. *See infra* notes 66-71.

57. Liljeberg v. Health Acquisition Services Corp., 486 U.S. 847, 864, 865.

58. ARK. CONST. art. VII, § 20; GA. CONST. art. VI, § 7, para. 7; ILL. CONST. art. VI, § 15(c); MISS. CONST. art. VI, § 165; N.H. CONST. pt. 1, art. 35; N.M. CONST. art. VI, § 18; N.D. CONST. art. VI, § 11; S.C. CONST. art. VI, § 15; TENN. CONST. art. VI, § 11; UTAH CONST. art. VIII, § 13; 28 U.S.C. § 455; ARIZ. REV. STAT. ANN. § 12-409 (1982); CAL. CIV. PROC. CODE § 170.1 (West Supp. 1991); CONN. GEN. STAT. ANN. § 51-45a (West Supp. 1991); FLA. STAT. ANN. § 38.01, .02 (West Supp. 1991); HAW. REV. STAT. § 601-7 (1985);

Federal Judiciary Statute, 28 U.S.C. § 455(a), requires United States justice, judge or magistrate disqualification in proceedings "in which his or her impartiality might reasonably be questioned." The proceedings cover any litigation stage, including pretrial.[59] Congress' intent was to promote public confidence in judicial impartiality by demanding disqualification when a reasonable factual basis for doubting a judge's impartiality exists.[60]

This federal recusal statute applies an objective reasonable person test.[61] When a reasonable member of the public, knowing all the facts, would conclude that a judge's impartiality might reasonably be questioned, the judge should be disqualified from hearing the case.[62] This reasonable person standard does not require that the judge perceive or have knowledge of the disqualifying circumstances. "Scienter is not an element of a violation of § 455(a)."[63] Consequently, a reasonable person may question judicial integrity without the judge's awareness of the appearance of partiality. In such instances, the judge is not required to disqualify him or herself until he or she is aware of the outward appearance of partiality.[64] The unequivocal message from Congress and the United States Supreme Court is that partiality in fact does not have to exist.

IND. CODE ANN. § 33.2.1-8-1-10 (Burns Supp. 1990); IOWA CODE ANN. § 602.1606 (West 1988); KAN. STAT. ANN. § 20-311 (1988); LA. CODE. CIV. PROC. ANN. art. 151 (West Supp. 1991); ME. REV. STAT. ANN. tit. 14, § 1103 (Supp. 1990); MINN. STAT. ANN. § 487.40 (West 1990); MO. ANN. STAT. § 508.090 (Vernon Supp. 1991); MONT. CODE ANN. § 3-1-803 (1990); NEB. REV. STAT. § 24-739 (1989); N.J. STAT. ANN. § 2A:15-49 (West 1987); N.Y. JUD. LAW § 14 (McKinney 1983); OHIO REV. CODE ANN. § 2701.03 (Baldwin 1987); OKLA. STAT. ANN. tit.20, § 1401 (West Supp. 1991); OR. REV. STAT. § 14.210 (1990); TEX. GOV'T CODE ANN. § 21.005 (Vernon 1988); UTAH CODE ANN. § 78-7-1 (Supp. 1991); VT. STAT. ANN. tit. 12, § 61 (Supp. 1989); VA. CODE ANN. § 17-7(2) (1950); WASH. REV. CODE ANN. § 2.28.030 (1988); W. VA. CODE § 51-2-8 (1981); WIS. STAT. ANN. § 757.19 (1981).

59. 28 U.S.C. § 455 (1988) "(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

. . . . (d) For the purposes of this section . . . (1) 'proceeding' includes pretrial, trial, appellate review, or other stages of litigation . . . ."

60. HOUSE COMM. ON JUDICIARY, JUDICIARY — DISQUALIFICATION OF JUDGES ACT OF 1974, H. REP. NO. 93-1453, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355. *See generally* Liljeberg v. Health Acquisition Services Corp., 486 U.S. 847, 860.

61. *Id. See generally* Wheeler v. Southland Corp., 875 F.2d 1246, 1251 (6th Cir. 1989); U.S. v. Torkington, 874 F.2d 1441, 1446 (11th Cir. 1989); Parker v. Connors Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988), *reh'g denied*, 864 F.2d 795 (1988), *cert. denied*, 409 U.S. 1066, (1989); Browning v. Foltz, 837 F.2d 276, 279 (6th Cir. 1988), *cert. denied sub nom.* Browning v. Jabe, 488 U.S. 1018 (1989); Weatherhead v. Globe Int'l Inc., 832 F.2d 1226, 1227 (10th Cir. 1987); Trotter v. International Longshoremen's & Warehousemen's Union, Local 13, 704 F.2d 1141, 1144 (9th Cir. 1983).

62. HOUSE COMM. ON JUDICIARY, JUDICIARY — DISQUALIFICATION OF JUDGES ACT OF 1974, H. REP. NO. 93-1453, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355.

63. Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 859.

64. *Id.* at 861.

Maintaining public confidence in the fairness of the administration of justice is paramount.

A § 455(a) appearance of partiality must originate from an extrajudicial source. A judge is not considered partial based on having engaged in prior judicial functions in the case at issue. Judges who issue pretrial orders, encourage settlement, make in-court rulings on the case at issue, or who have heard other cases with one or more of the same parties, are not automatically deemed partial.[65] However, any partiality which manifests itself in case management, in court proceedings, or in judicial functions generally, may require recusal. Courts have defined disqualifying partiality as a pecuniary interest in the litigation's outcome,[66] a failure to distance oneself from one's own earlier ruling to address the same case on remand,[67] a personal relationship with a party,[68] comments indicating the suit should not have been filed,[69] a personal animosity toward an attorney,[70] or serving as a one-person grand jury and presiding over contempt trials stemming from the same grand jury proceeding.[71]

A. Partiality and ADR Rules

Judicial rulemaking and lobbying for laws regarding the judiciary, are not judicial functions, but are legislative functions outside a judge's adjudicatory role.[72] When judges promulgate rules or openly encourage statutes which cause a reasonable person to question judicial impartiality, either those judges should not adjudicate cases affected by such rules or statutes, or the rules and statutes should be abolished.

A reasonable person would probably not consider judge-made rules

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65. U.S. v. Grinnell Corp., 384 U.S. 563, 583 (1966); Wheeler v. Southland Corp., 875 F.2d 1246, 1251; Toth v. Trans World Airlines, Inc., 862 F.2d 1381, 1388 (9th Cir. 1988); Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1301 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 825 (1988); Browning v. Foltz, 837 F.2d 276, 279; Hasbrouck v. Texaco, Inc., 830 F.2d 1513, 1524 (9th Cir. 1987), *aff'd on other grounds*, 110 S. Ct. 2535 (1990); U.S. v. Widgery, 778 F.2d 325, 328 (7th Cir. 1985); Demjanjuk v. Petrovsky, 776 F.2d 571, 577 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

66. Liljeberg v. Health Acquisition Services Corp., 486 U.S. 847; Aetna Life Ins. v. LaVoie, 475 U.S. 813 (1986) (judgment vacated and recusal); Connally v. Georgia, 429 U.S. 245 (1977) (judgment vacated); Ward v. Village of Monroeville, Ohio, 409 U.S. 57 (1972) (recusal); Tumey v. Ohio, 273 U.S. 510 (1926) (reversal and recusal).

67. U.S. v. White, 846 F.2d 678, 696 (11th Cir. 1988), *cert. denied sub nom.* Smith v. Scott, 488 U.S. 984 (1988) (recusal).

68. Parker v. Connors Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988) (recusal).

69. U.S. v. Torkington, 874 F.2d 1441, 1447 (11th Cir. 1989) (recusal).

70. Taylor v. Hayes, 418 U.S. 488 (1974); Offutt v. U.S., 348 U.S. 11 (1954) (reversal and recusal).

71. In re Murchison, 349 U.S. 133 (1954) (reversal).

72. Supreme Court of Va. v. Consumers Union of the U.S., Inc., 446 U.S. 719, 734 (1980).

or judge-encouraged statutes mandating nonbinding ADR as indicative of partiality. This conclusion may be drawn based on the nonbinding ingredient. Conversely, when such rules are supplemented with punitive measures triggered by trial requests, a reasonable person might conclude that an overworked, underpaid judge may affect a decision on the merits to, at least, prevent trial petitioners from faring as well in the trial as they did in ADR proceedings.[73] The resulting penalty would punish the petitioning party and set an example. A reasonable person might then conclude that an appearance of injustice or of partiality exists.

Disqualifying all judges who promulgate or encourage penalty-carrying ADR rules or statutes would ill serve ADR and the judiciary. ADR would become a pariah. The benefits of ADR would not be realized because judges would not mandate it for fear that trials *de novo* would be requested. Furthermore, existing ADR rules and statutes would be revoked and new rules or statutes would not be enacted. The reasonable solution would be to remove the penalty provision sections in order to maintain the appearance of justice. Without penalty provisions, judges would have no reason to affect the trial outcome in order to, at least, equalize trial and ADR outcomes.

VI. JUDICIAL RULEMAKING AUTHORITY AND PENALTY PROVISIONS

State and federal courts are usually granted general authority to make local rules.[74] Federal authority is granted under Rule 83 of the

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73. United States Supreme Court Chief Justice Rehnquist has been publicly vocal in pursuing increased salaries and decreased workloads for the judiciary. *E.g.*, *Rehnquist: Judicial Caseload Justifies Raise*, CHICAGO TRIB., Jan. 1, 1991, § 1, at 5; *Rehnquist Applauds Pay Raises for Judges*, L.A. TIMES, Jan. 1, 1991, at A22 (home ed.); *Raise Bolsters the Judiciary, Rehnquist Says*, N.Y. TIMES, Jan. 1, 1991, § 1, at 10 (late ed.); *Chief Justice Makes Plea for More Federal Judgeships to Help in Fight Against Drugs*, N.Y. TIMES, Jan. 1, 1990, § 1, at 10 (late ed.); *Opposing a Raise for Federal Judges*, N.Y. TIMES, Oct. 22, 1989, § 12NJ, at 26 (late ed. — final); *New Jersey Q & A: Harold A. Ackerman; Seeking a Raise for Federal Judges*, N.Y. TIMES, Aug. 20, 1989, § 12NJ, at 3 (late ed. — final); *Most U.S. judges earn more off the bench, study says*, CHICAGO TRIB., June 5, 1989, § 1, at 8 (final ed.); *Most Federal Judges Get Outside Income*, L.A. TIMES, June 5, 1989, pt. 1, at 8 (southland ed.); *U.S. Judges Earn Considerably More Than Salary*, N.Y. TIMES, June 5, 1989, at B6 (late ed. — final); *Rehnquist Urges Congress to Increase Judges' pay 30%*, CHICAGO TRIB., May 4, 1989, News § at 4, zone M (final ed.); L.A. TIMES, May 4, 1989, pt. 1, at 2 (home ed.); N.Y. TIMES, May 4, 1989, at B12 (late city final ed.); *Rehnquist Urges Raise for Judges; 30% Boost Needed Now, Congress Told*, WASH. POST, May 4, 1989, at A4 (final ed.).

74. 28 U.S.C. § 2071(a); Frazier v. Heebe, 482 U.S. 641, 645 (1987). *See also* COLO. CONST. art. VI, § 21; FLA. CONST. art. V, § 3; GA. CONST. art. VI, § 9, ¶ 1; HAW. CONST. art. VI, § 7; LA. CONST. art. V, § 5(A); MD. CONST. art. IV, § 18(a); MICH. CONST., art. VI, § 5; MO. CONST. art. V, § 5; MONT. CONST. art. VII, § 2(3); NEB. CONST. art. V, § 25; N.H. CONST. pt. 2, art. 73-a; N.J. CONST. art. VI, § 2, ¶ 3; N.C. CONST. art. VI, § 13(2); OHIO

Federal Rules of Civil Procedure and under 28 U.S.C. § 2071(a). Both sources permit district courts to proscribe "rules for the conduct of their business."[75] Congress has also authorized rulemaking for establishing pilot ADR programs in selected district courts. That authority extends to creating penalty provisions.[76] The rules must, however, be consistent with Acts of Congress and United States Supreme Court practice and procedure.

The general standard is that local rules are necessary in order to carry out the conduct of a district court's business.[77] Rulemaking authority is not limitless and the United States Supreme Court may exercise its authority to "ensure that the local rules are consistent with the principles of right and justice."[78] The Court has abolished some local rules because they do not help carry out the courts' business,[79] because they do not follow United States Supreme Court practice,[80] or because they are inconsistent with established Acts of Congress.[81] Compulsory nonbinding ADR is frequently provided for in local court rules.[82] Clearly, compulsory nonbinding ADR is not inconsistent with United States Supreme Court practice because it is indirectly provided for in Rule 16 of the Federal Rules of Civil Procedure.[83] Although compulsory nonbinding ADR may help courts conduct their business, penalty provisions are superfluous to that end. With compulsory nonbinding ADR, the parties are already channeled into a settlement procedure which relieves docket

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CONST. art. IV, sec. 5(B); S.C. CONST. art. V, § 4; S.D. CONST. art. V, § 12; VT. CONST. ch. II, § 37; VA. CONST. art. VI, § 5; WASH. CONST. art. IV, § 24; ARK. STAT. ANN. § 16-13-202 (1987); CAL. GOV'T CODE § 68070 (West Supp. 1991); CONN. GEN. STAT. ANN. § 51-14 (West 1985); DEL. CODE ANN. tit. 10, § 561 (1974); IDAHO CODE § 1-212 (1990); ILL. ANN. STAT. ch. 110, ¶ 1-104 (Smith-Hurd 1983); IOWA CODE ANN. § 602.4201 (West 1988); KAN. STAT. ANN. § 20-321 (1988); MINN. STAT. ANN. § 480.05 (West 1990); NEV. REV. STAT. ANN. § 2.120 (Michie 1986); OKLA. STAT. ANN. tit. 20, §§ 23, 24 (West Supp. 1991); OR. REV. STAT. § 1.006 (1988); TENN. CODE ANN. §§ 16-3-402, 407 (1980); UTAH CODE ANN. § 78-7-6 (1953).

75. "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed [by the Supreme Court]." 28 U.S.C. § 2071(a) (1988). "Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules." FED. R. CIV. P. 83.

76. 28 U.S.C. §§ 651, 655.

77. Frazier v. Heebe, 482 U.S. 641, 645 (1987).

78. *Id.* (quoting In re Ruffalo, 390 U.S. 544, 554 (1968) (White, J., concurring)).

79. *Id.* at 646-50.

80. *Id.* at 646; Miner v. Atlass, 363 U.S. 641, 647 (1960).

81. Bank of Nova Scotia v. U.S., 487 U.S. 250, 254 (1988); Thomas v. Arn, 474 U.S. 140, 148 (1985); Alyeska Pipeline Serv., Co. v. Wilderness Society, 421 U.S. 240, 269 (1975).

82. *See supra* notes 16-18.

83. Nejelski & Zeldin, *supra* note 2, at 807.

congestion. Furthermore, since participants are so satisfied with ADR, there should not be a high frequency of trial *de novo* petitions.[84] Accordingly, the mere provision of ADR, without penalties, has fulfilled the courts' business needs.

VII. ABOLISHING PENALTY PROVISIONS

In his insightful opinion for the Fourth Circuit Court of Appeals, Judge John Parker noted that "[a] suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice."[85] The administration of justice includes attorney accountability. Attorneys are not obliged to make allegations or to conduct a case in accord with the client's desires. In discussing this issue the Fourth Circuit Court of Appeals stated:

> A lawyer must always remember that he is an officer of the court. He may zealously represent his client, but only within the bounds of 28 U.S.C. § 1927, [and] Federal Rule of Civil Procedure 11 . . . . We emphatically reject any suggestion that a lawyer may shield his transgressions behind the simplistic plea that he only did what his client desired.[86]

When an attorney's case has completed a mandatory nonbinding ADR process, he or she should have a strong sense of the case's merits. Pursuit of meritless cases or of cases for which there is no hope of gaining a judgment more favorable than the ADR decision is frivolous. The attorneys pursuing such cases, regardless of the client's desires, should be held accountable. Accordingly, penalties should be used to discourage the attorney's pursuit of frivolous litigation, rather than to penalize the clients.

Rule 11 of the Federal Rules of Civil Procedure authorizes sanctions when attorneys sign case documents with knowledge that the

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84. JANE W. ADLER ET AL., SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM 61-76 (1983); S. CLARK ET AL., *supra* note 42, at 57; DEBORAH R. HENSLER ET AL., JUDICIAL ARBITRATION IN CALIFORNIA 91 (1981); ROBERT J. MACCOUN, ALTERNATIVE ADJUDICATION: AN EVALUATION OF THE NEW JERSEY AUTOMOBILE ARBITRATION PROGRAM 47-62 (1988); *BNA, Users Like, and Want More, Speed in Arbitration*, 1 A.D.R. REP. 189 (Aug. 20, 1987); Hensler, *supra* note 8, at 276; Nejelski & Zeldin, *supra* note 2, at 816; Michael J. Norris, *National Trends in Mandatory Arbitration*, 17 COLO. LAW. 1313, 1314 (July 1988); Pearson, *supra* note 10, at 426, 431.

85. United States v. A.H. Fischer Lumber Co., 162 F.2d 872, 873 (4th Cir. 1947).

86. Blair v. Shenandoah Women's Ctr., Inc., 757 F.2d 1435, 1438 (4th Cir. 1985).

document is not well grounded in fact, not supported by existing law, or does not advance a good faith argument for a change in the law.[87] Courts may impose sanctions when such documents are signed to harass, cause court delay, or increase litigation costs.[88] Almost every state court system has a similar rule.[89] Courts have upheld Rule 11 sanctions against attorneys for filing an appeal when the trial court deemed the claims frivolous,[90] for pursuing an argument after its final disposition on summary judgment,[91] and for pursuing an action after learning it was groundless.[92] Some courts limit application of sanctions to signing papers with knowledge of frivolity or when failing to inquire into the case

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87. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

FED. R. CIV. P. 11.

88. *Id.*

89. *E.g.*, GA. CODE ANN. § 9-15-14 (Supp. 1990); KAN. STAT. ANN. § 60-211 (Supp. 1990); LA. CODE CIV. PROC. ANN. art. 864 (West 1984); NEB. REV. STAT. § 25-824 (1989); OKLA. STAT. ANN. tit. 12, § 2011 (West Supp. 1991); TEX. CIV. PRAC. & REM. CODE ANN. § 9.012 (Vernon Supp. 1991); VA. CODE ANN. § 8.01-271.1 (Supp. 1990); WASH REV. CODE ANN. § 4.84.185 (West 1988); WYO. STAT. § 1-14-128 (Supp. 1991); ALA. C.P.R. 11 ARIZ. C.P.R. 11; ARK. C.P.R. 11; COLO. C.P.R. 11; CONN. SUPER. CT. R. § 111; DEL. SUPER. CT. CIV. R. 11; D.C. SUPER. CT. R. 11; IDAHO C.P.R. 11(a)(1); IND. C.P.R. TR. 11; IOWA C.P.R. 80; KY. C.P.R. 11; ME. C.P.R. 11; MD. C.P.R. 1-311; MASS. C.P.R. 11; MICH. C.P.R. 2.114(E), (F); MINN. C.P.R. 11; MISS. C.P.R. 11; MO. C.P.R. 55.03; MONT. C.P.R. 11; N.J. GEN. APP. R. 1:4-8; N.M. D. CT. C.P.R. 1-011; N.Y. UNIF. R. § 130.1-1; N.D.C.P.R. 11; OHIO C.P.R. 11; R.I. SUPER. CT. R. 11; S.C. C.P.R. 11; TENN. C.P.R. 11; UTAH C.P.R. 11; VT. C.P.R. 11; VA. S.CT. R. 1:4(a); WASH. SUPER. CT. R. 11; W. VA. C.P.R. 11; WIS. C.P.R. 802.05.

90. Hamer v. County of Lake, 871 F.2d 58, 60 (7th Cir. 1988), *cert. denied sub nom.* Patner v. County of Lake, 110 S. Ct. 146 (1989).

91. Deere & Co. v. Deutsche Lufthansa Aktiengesellschaft, 855 F.2d 385, 392 (7th Cir. 1988).

92. Fahrenz v. Meadow Farm Partnership, 850 F.2d 207, 210 (4th Cir. 1988); City of Yonkers v. Otis Elevator Co., 844 F.2d 42, 49 (2d Cir. 1988); Gaiardo v. Ethyl Corp., 835 F.2d 479, 484 (3d Cir. 1987).

merits.[93] Attorneys filing trial *de novo* requests in ADR cases, should be sanctioned under Rule 11 for pursuing frivolous cases, or for signing the trial request with knowledge that there is no hope of obtaining a trial outcome more favorable than the ADR decision.

28 U.S.C. § 1927 permits federal courts to sanction any attorney who "multiplies the proceedings in any case unreasonably and vexatiously."[94] The statute's purpose is to limit the abuse of court processes, and it is triggered by attorneys litigating in bad faith.[95] Section 1927 is grounded in the recognition that "[s]uits are easy to file and hard to defend. Litigation gives lawyers opportunities to impose on their adversaries costs much greater than they impose on their clients. The greater the disparity, the more litigation becomes a predatory instrument rather than a method of resolving honest disputes."[96]

Applying Section 1927 courts have held that continuing an action after discovering that it is meritless is unreasonable and vexatious.[97] "Dogged pursuit of a colorable claim" is actionable bad faith.[98] Relitigating a matter already reasonably decided is frivolous and in bad faith.[99] Accordingly, multiplying proceedings by pursuing trials *de novo* is a Section 1927 violation for which attorneys should be held accountable.

"Frivolity, like obscenity, is often difficult to define. With courts struggling to remain afloat in a constantly rising sea of litigation, a frivolous appeal can itself be a form of obscenity."[100] The contribution to dockets of frivolous requests for trials *de novo* can be effectively extinguished by rigorous application of Rule 11 of the Federal Rules of

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93. National Ass'n of Gov't Employees v. National Fed'n of Fed. Employees, 844 F.2d 216, 222 (5th Cir. 1988); Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 548, 557 (9th Cir. 1986), *cert. denied sub nom.* Barton v. E.F. Hutton, 484 U.S. 822 (1987).

94. Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927.

95. HOUSE COMM. OF CONFERENCE, ANTITRUST IMPROVEMENTS ACT OF 1980, H. R. CONF. REP. NO. 1234, 96th Cong., 2d Sess. 8, *reprinted in* 1980 U.S.C.C.A.N. 2716, 2782. *See also* Roadway Express, Inc. v. Piper, 447 U.S. 752, 762 (1980).

96. *In re* T.C.I., Ltd., 769 F.2d 441, 446 (7th Cir. 1985).

97. Walter v. Fiorenzo, 840 F.2d 427, 433 (7th Cir. 1988); Jones v. Continental Corp., 789 F.2d 1225, 1230 (6th Cir. 1986); Hagerty v. Succession of Clement, 749 F.2d 217, 222 (5th Cir. 1984), *cert. denied sub nom.* Hagerty v. Keller, 474 U.S. 968 (1985).

98. In re T.C.I., Ltd., 769 F.2d 441, 445.

99. Hughes v. Hoffman, 750 F.2d 53 (8th Cir. 1984).

100. WSM, Inc. v. Tennessee Sales Co., 709 F.2d 1084, 1088 (6th Cir. 1983).

Civil Procedure and of 28 U.S.C. § 1927. After ADR proceedings, attorneys can assess the merits of their cases and should be sanctioned for pursuing meritless cases. ADR penalty provisions are, therefore, unnecessary because the appropriate parties to sanction are already sanctionable under existing laws and rules.

VIII. CONCLUSION

Compulsory nonbinding ADR is an effective docket reduction method,[101] but the merits of its accompanying penalty provisions are doubtful. The deterrence effects of penalty provisions make them at least constitutionally suspect. Enforcement of compulsory ADR penalty provisions under Rule 16 of the Federal Rules of Civil Procedure stretches judicial authority beyond appropriate limits. Further, the appearance of justice may be tarnished by judicial penalty enforcement when their creating rules and statutes were judge made or influenced.

ADR penalties are currently misdirected toward discouraging the exercise of rights to trial. Legitimate judicial concerns do exist when parties pursue trials *de novo* on frivolous complaints. Such concerns are appropriately addressed through federal and state court rules and laws governing attorney responsibility for filing well grounded complaints. Responsibility for unnecessarily increasing litigation should be placed where it belongs, on the attorney's shoulders.

Penalty provisions included in compulsory nonbinding ADR rules and statutes should be abolished. They pose serious legality questions. They taint both a valuable dispute resolution mechanism and the image of a judiciary concerned about its workload. Finally, based on the success of ADR,[102] penalty provisions are simply unnecessary.

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101. MICHIGAN MEDIATION PRACTICE § 1.07 (Mary R. Minnet ed., 1987); Nejelski & Zeldin, *supra* note 2, at 808; Pearson, *supra* note 10, at 429.

102. *See supra* notes 84 and 101.